UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BP WEST COAST PRODUCTS, LLC, Plaintiff, v. HATEM SHALABI, et al., Defendants.	CASE NO. C11-1341 MJP ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff BP West Coast Products, LLC (BPWCP)'s motion for summary judgment. (Dkt. No. 126.) Defendants Hatem Shalabi ("Shalabi") and Harbor Olympic Land, LLC, et al., (collectively, "Shalabi Entities") filed an untimely response. (Dkt. No. 136.) In their reply, BPWCP asks the Court to strike the response because it is untimely. (Dkt. No. 146 at 1.) The Court notes it is within its discretion to strike the response, however, because of the dispositive nature of this motion the Court considered all papers and related documents filed and GRANTS the motion for summary judgment.

Background

BPWCP brought this suit in August of 2011 against Defendants alleging several causes of action, and now seeks summary judgment on the actions for breach of contract, breach of guaranties, declaratory judgment. (Dkt. No. 126.) BPWCP is engaged in the marketing and distribution of motor fuel in the State of Washington and elsewhere in the United States. (Dkt. No. 1 at 9.) BPWCP sells ARCO brand motor fuels to franchisees, and at certain properties offers ampm mini market convenience stores to be operated with the gasoline stations. (Id.) Shalabi and the Shalabi Entities purchased or leased 23 stations from Plaintiff, 16 of which are at issue in this lawsuit. (Dkt. No. 126 at 2.)

Thirteen of the properties at issue were transferred by way of a Special Warranty Deed that imposed use restrictions. (Id. at 3.) In addition to the property sales, BPWCP sold some of its retail operations to each of the 16 Shalabi Entities on the condition they enter into ARCO Gasoline Dealer Agreements ("GDAs"), which granted BPWCP the exclusive right to supply gasoline for 20 years. (Id. at 4.) The GDAs included the sublease for the property and the motor fuel supply agreement. (Id.) BP also entered into 16 franchise agreements referred to as "ampm Agreements," although two of the properties intended to have an ampm store ultimately did not have one and those two agreements (sites 82942 and 83038) are not relevant here. (Id.) BPWCP alleges they sold the stations to Shalabi and the Shalabi Entities for substantially less than their market value in anticipation of the consideration they would receive from Defendants' continued purchase of their gasoline for the term of the GDAs and ampm Agreements (collectively, "Franchise Agreements"). (Dkt. No. 126 at 5.)

For each Franchise Agreement between BPWCP and the Shalabi Entities, Shalabi executed a separate Guaranty Agreement with BPWCP, providing the individual Defendant

Hatem Shalabi "irrevocably, fully and unconditionally" guaranteed to BPWCP "full and prompt performance and payment when due" of "any and all of the obligations" the Shalabi Entities may owe to BPWCP. (see, e.g., Dkt. No. 128-4 at 2.) These Guaranties provide if the Shalabi Entities fail to pay, BPWCP has the right to recover from Shalabi personally. (Id. at 3-4.)

BPWCP alleges Defendants breached their franchise agreements and Guaranties, and violated Deed Restrictions for the properties at issue. BPWCP claims beginning in September 2010, Defendants began having difficulties paying for gasoline deliveries, and BPWCP began providing gasoline on credit which Defendants retained and resold to consumers. (Dkt. No. 1 at 18.) Defendants also began falling behind on royalty payments. (Id.) BPWCP further alleges Defendants breached the Franchise Agreements by failing to make available for sale all grades of gasoline in an amount sufficient to satisfy customer demand, selling unbranded gasoline, and failing to comply with branding requirements. (Id. at 19-20.) BPWCP also argues the resulting operation of unbranded gasoline stations and minimarts violates the Deed Restrictions on the properties. (Id. at 24.)

BPWCP claims it is (1) entitled to summary judgment against the Shalabi Entities for breach of the GDAs and ampm Agreements, (2) entitled to summary judgment against Shalabi for breach of the Guaranties, and (3) entitled to a declaratory judgment that the Deed Restrictions on the properties are enforceable. (Dkt. No. 126 at 10-14.) In their response, Defendants do not dispute the existence or contents of the GDAs, ampm Agreements, Guaranties, or Deed Restrictions. (Dkt. No. 136.) Instead they argue, (1) Shalabi has no personal liability for breach of the Guaranties because they were executed separately and before the Franchise Agreements and Deed of Trust and thus were made without consideration, (2) Plaintiff is not entitled to declaratory relieve because the Deed Restrictions contain no enforcement mechanism and are

therefore unenforceable, and (3) there is a discrepancy between the amount of damages sought in Plaintiff's complaint and the amount requested on summary judgment, and this is an issue of material fact precluding summary judgment. (Id. at 2-7.)

Analysis

I. Untimely Filing

A district court has discretion not to accept untimely filings. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 895 (1990). A court may extend a deadline after the time has expired "on motion made . . . if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). "To determine whether neglect is excusable, a court must consider four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." Petrone v. Veritas Software Corp., 496 F.3d 962, 973 (9th Cir. 2007)(citations omitted).

The Court finds the prejudice to the opposing party minimal. Although Plaintiff's time to reply was reduced by half, Plaintiff was able to submit a timely reply. Likewise, the length of delay did not impact the proceedings in this case. The cited reason for delay, confusion over whether local counsel or former pro hac vice counsel would be responding to the motion and lack of access to relevant documents, is unacceptable. (Dkt. No. 139 at 2.) It is also indicative of bad faith. Local Counsel has already been instructed by this Court he must play an active role in this litigation. (Dkt. No. 124 at 4.) It is unclear to the Court why, under these circumstances, Local Counsel would be without access to documents central to this case. For this reason the delay appears in bad faith.

With the 9th Circuit factors weighing evenly in favor of consideration of the response and striking it, the Court opts to consider Defendants' response. Because this motion is dispositive, it is in the interest of justice to consider the response.

II. Standard for Summary Judgment

Summary judgment is warranted if no material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). If the moving party makes this showing, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. Id. at 324.

III. Breach of GDAs and ampm Agreements

The Parties do not dispute the existence or content of the GDAs and ampm agreements. Defendants' only argument with respect to these agreements is Plaintiff's motion for summary judgment requests more damages than what was specified in the Complaint, and this creates a factual issue precluding summary judgment. (Dkt. No. 136 at 7.)

There is no issue of material fact stemming from the discrepancy in the damages listed in the Complaint and the motion for summary judgment. Defendants concede they owe Plaintiff $1,363,300.59. (Id., and Dkt. No. 138 at 2, confirming a figure of $1,363,300.39.) The figure of $1,363,300.39 is consistent with the amount listed in Plaintiff's Complaint. (Dkt. No. 1 at 26.) The Complaint lists this amount as the unpaid amount "currently due and owing" and goes on to allow for "additional damages" to be proven at trial. (Id. at 27.)

Plaintiff claims damages in its motion for summary judgment of $1,395,538.18. (Dkt. No. 126 at 12.) Both Parties submit declarations regarding damages; Defendants submit the Foss Declaration (Dkt. No. 138) and Plaintiff the Swinson Declaration (Dkt. No. 129.). Exhibit 4 of Defendants' Foss Declaration "shows all the activity for the actual unpaid gas and royalty amounts BP claims" and totals $1,326,180.12. (Dkt. No. 138 at 3, Dkt. No. 138-4 at 3.) This is a discrepancy from the amount claimed in the summary judgment motion of $69,358.06. Plaintiff explains the discrepancy by acknowledging it has retained credits owed to Defendants it did not apply to the amount of damages claimed. (Dkt. No. 129 at 5.) These credits include $29,124.35 to Site 82431 and $40,233.71 to Site 82941. (Id. at 6.) The credits total $69,358.06, accounting for the discrepancy in the Parties' numbers. Plaintiff acknowledges it owes Defendants these sums, but this does not erase or reduce the total owed to Plaintiff. There is no issue of fact with regard to damages, and summary judgment for breach of the Franchise Agreements is GRANTED in favor of Plaintiff.

IV. Breach of Guaranties

Defendants argue Mr. Shalabi is not personally liable under the Guaranties he executed because they "were signed by Mr. Shalabi in his personal capacity long before" any other real estate transactions or franchise agreements were finalized. (Dkt. No. 136 at 3.) Because of this,

Defendants claim the Guaranties are unenforceable for lack of consideration. (Id.) Plaintiff responds the affirmative defense of lack of consideration was waived, or alternatively, the Guaranties are supported by consideration. (Dkt. No. 146 at 6-7.)

a. Waiver

If an affirmative defense is not pleaded in an answer, it is generally waived. Morrison v. Mahoney, 399 F.3d 1042, 1046 (9th Cir. 2005), Fed. R. Civ. P. 8(c)(1). Defendants raised the affirmative defense of lack of consideration in their Amended Answer, although not clearly in reference to the Guaranties. (Dkt. No. 67 at 6.) The Amended Answer seems to allege lack of consideration as an affirmative defense to Plaintiff's claims for breach of the Franchise Agreements. (Id.) Despite the vague nature of the Amended Answer on this point, the Court finds the affirmative defense not waived. A reasonable reader could interpret the affirmative defense as being raised broadly to reach the Guaranties. Further, to the extent the consideration for the Franchise Agreements and the consideration for the Guaranties amount to the same thing, the Amended Answer could be read as applying to the Guaranties.

b. Failure of consideration

"The contract of guaranty is an undertaking or promise on the part of one person which is collateral to a primary or principal obligation on the part of another, and which binds the obligor to performance in the event of any nonperformance by such other, the latter being bound to perform primarily." Robey v. Walton Lumber Co., 17 Wn.2d 242, 255 (1943), quoting 24 Am. Jur. 873-4, § 2. A guaranty executed after the creation of the principal obligation is founded on the consideration of the original contract where the original contract was induced by or created on the faith of the guaranty. Universal C.I.T. Credit Corp v. De Lisle, 47 Wn. 2d 381, 321 (1955). Consideration moving to the principal alone, contemporaneous with or subsequent to the

promise of the guarantor, is sufficient to support the guaranty. Id. at 322. A guaranty may by its own terms nominate the consideration for which it is given. F.C. Palmer & Co. v. Chaffee, 129 Wash. 408, 412 (1924).

A guaranty "should not be given an unfair and strained interpretation to restrict or diminish the guarantor's obligation." Francher Cattle Co. v. Cascade Packing, 26 Wn. App. 407, 401 (1980). Defendants cite Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 659 (2010) for the proposition that guaranties are separate contracts existing independently from the original obligations between the principal obligor and the obligee. While this language is correct, Freestone Capital was speaking in terms of the application of a choice of forums clause, not in terms of consideration.

Defendants' reliance on Gelco IVM Leasing Co. v. Alger, 6 Wn. App. 519, 523 (1972) is also mislaid. This case does say if a guaranty "is made independently of the main debt, it must have a separate and distinct consideration and, accordingly, a past transaction or executed consideration will not support a contract of guarantee" unless one of several exceptions are met. Id. This should not be read to upset the basic purpose of a guaranty, which is to aid in inducing the creditor to participate in the underlying obligation. The part of the Gelco opinion Defendants rely on is directed at guarantees entered after the underlying contract was made and possibly executed. Gelco holds, "Where, as here, [the creditor] made no request of the guarantors for a promise of guaranty prior to the execution of the lease . . . a promise of guaranty cannot be implied nor was one, in fact, established." Id.

Defendants' assertion the Guaranties were made independently from the main debt and therefore not supported by consideration is untenable. The Guaranties contemplate the consideration they are supported by. For example, the Guaranty for Site 83034 states, "In order

to induce [BPWCP] . . . to enter into or continue a Contract Dealer Gasoline Agreement and the am/pm Mini Market Agreement (collectively, the "Franchise Agreement"), as amended from time to time, with Harbor Olympic Land 5816, LLC ("Debtor"), and for other good value and consideration" the undersigned Hatem Shalabi ". . . unconditionally guaranties to BP the full and prompt performance and payment when due" by the Shalabi entitiy at issue. (Dkt. No. 128-4 at 16.) The Guaranties all have language to this effect. The fact that the Guaranties were entered into before the Franchise Agreements supports, rather than calls into question, the notion the bargain struck in the Franchise Agreements was intended to be consideration for the Guaranties. Summary judgment is GRANTED in favor of Plaintiff on the breach of Guaranties claim.

V. Declaratory Judgment on Deed Restrictions

Plaintiff seeks a declaration pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, that the Deed Restrictions on the properties at issue are enforceable restrictive covenants and Defendants' actions in operating unbranded gasoline service stations and convenience stores violates the Deed Restrictions. (Dkt. No. 1 at 26.) Defendants claim Plaintiff is not entitled to declaratory judgment because (1) the deeds contain no enforcement mechanisms for the Deed Restrictions so BPWCP has no residual or reversionary interests in the properties, (2) the Deed Restrictions do not run with the land and will terminate with the 20-year contracts between the Parties, such that they cannot bind successors in interest after the expiration of that term, and (3) because BPWCP claims the Deed Restrictions are easements in gross they cannot bind successors in interest under Washington law. (Dkt. No. 136 at 5.) Defendants' second two arguments are unripe and not relevant to this case. Plaintiff is seeking a declaratory judgment on the validity of the Deed Restrictions as applied to Defendants and their current use and

possession of the properties at issue. (Dkt. No. 146 at 8.) The Court will only consider Defendants' first argument.

a. Declaratory judgment standard

The Declaratory Judgment Act allows a court to recognize a plaintiff's right even where no immediate enforcement is sought, and further relief based on the declaratory judgment may be granted whenever necessary or proper. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 300 (1943). To determine whether declaratory judgment is appropriate, a district court must determine (1) whether an actual case or controversy exists, and (2) whether the court should exercise its discretion to award declaratory relief. Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005).

"[T]he appropriate standard for determining ripeness of private party contract disputes is the traditional ripeness standard, namely, whether 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. at 671, quoting Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). The Parties here do not dispute an actual case or controversy exists between them. Plaintiff asserts multiple claims against Defendants for breach of contract and failure to comply with the Deed Restrictions, and Defendants allege the Deed Restrictions are unenforceable and void. (Dkt. No. 126 at 15, Dkt No. 136 at 5.) There is an actual case or controversy on the issue of the Deed Restrictions, and this prong of the declaratory judgment test is met.

In determining whether a district court should exercise its discretion to issue a declaratory judgment the court should consider the factors set out in Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942). Principal Life Ins. Co., 394 F.3d at 669. The Brillhart factors state, "(1) the district

court should avoid needless determination of state law issues, (2) it should discourage litigants from filing declaratory judgment actions as a means of forum shopping, and (3) it should avoid duplicitous litigation." Id. at 672 (citations omitted). The 9th Circuit laid out additional factors, including (1) whether the judgment will serve a useful purpose in clarifying and settling the legal relations at issue, (2) whether it will afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding, (3) whether it will settle all aspects of the controversy, (4) whether it is being sought for procedural fencing or to obtain a res judicata advantage, (5) whether it will result in entanglement between the federal and state court systems, (6) convenience of the parties, and (7) availability and convenience of other remedies. Principal Life Ins. Co., 394 F.3d at 672.

Defendants do not argue any of the factors articulated by the 9th Circuit weigh against this Court issuing a declaratory judgment. All factors favor the Court exercising its discretion to act. This case was filed in this Court and a declaratory judgment will not create entanglement with state courts, and there is no forum shopping issue. (Dkt. No. 126 at 17.) Settling this controversy by declaratory judgment will promote judicial economy, clarify the rights and obligations of the Parties, and be to the ultimate convenience of all Parties involved. An analysis of all factors weighs in favor of issuing a declaratory judgment on the Deed Restrictions.

b. Enforceability

Defendants' only ripe argument against this Court issuing summary judgment on the Deed Restrictions claim is the deeds contain no enforcement mechanisms so BPWCP has no residual or reversionary interest in the properties. (Dkt. No. 146 at 8.) They claim this makes the Restrictions void. Defendants rely on Alby v. Banc One Financial, 119 Wn. App. 513 (2003), which says "[i]t is generally accepted that a stipulation in a conveyance restricting the grantee's

right to sell or dispose of the property is ineffective in the absence of a provision for reversion, limitation over, or the like." Alby, 119 Wn. App. at 521 (emphasis omitted). Defendants' reliance on Alby is misplaced. Alby speaks to restraints on alienation, not restrictive covenants. Id. at 516. Plaintiff does not assert and the Deed Restrictions do not suggest an intent to restrain alienation, rather, they restrict the way the properties can be used. (Dkt. No. 146 at 8.)

Defendants do make an argument related to use restrictions, citing King County v. Hanson Inv. Co., 34 Wn.2d 112 (1949) for the proposition that a deed containing use restrictions in recitals without any built-in enforcement mechanism will be construed as "giving rise, at most, to an implied covenant that the grantee will use the property only for the specified purpose." King County, 34 Wn.2d at 119. They claim this means without specific language referring to an enforcement mechanism, the Deed Restrictions are unenforceable. This argument fails for at least two reasons.

First, the Deed Restrictions were incorporated by specific reference in the special warranty deed signed by Defendants and they do, by their own terms, contemplate a remedy for breach. (See, Dkt. No. 128-1 at 2.) The Deed Restrictions say:

> Grantee acknowledges that the breach of any of the covenants or restrictions contained in this Exhibit "B" on the part of Grantee will result in irreparable harm and continuing damages to Grantor and Grantor's business, and that Grantor's remedy at law for any such breach or threatened breach would be inadequate. Accordingly, in addition to such remedies as may be available to Grantor at law or in equity in the event of any such breach, any court of competent jurisdiction may issue an injunction (both preliminary and permanent), without bond, enjoining and restricting the breach or threatened breach of any such covenant or restriction by Grantee.

(Id. at 15.) The language in King County does not contradict the enforceability of the Deed Restrictions because they have a built-in enforcement mechanism of injunction. Although Plaintiff says in its motion it is not seeking enforcement at this time, the

remedy it seeks in its complaint is exactly the remedy contemplated by the Restrictions: permanent injunction. (Dkt. No. 1 at 26.)

Second, King County is about the creation of a determinable fee simple estate with the possibility of reverter in the grantor. King County, 34 Wn.2d at 116. The question here is whether the Deed Restrictions are enforceable restrictive covenants, not whether Plaintiff has a reverter. Restrictive covenants are enforceable promises related to the use of land. Lakewood Racquet Club, Inc. v. Jensen, 156 Wn. App. 215, 222 (2010). "Covenants are useful because they create land use arrangements that remain intact despite changes in ownership of the land." (Id., citations omitted.)

A restrictive covenant is unenforceable if it is illegal, unconstitutional, or violates public policy. RESTATEMENT (THIRD) OF REAL PROPERTY: SERVITUDES § 3.1. Defendants do not argue the Deed Restrictions are illegal, unconstitutional or in violation of public policy. Nor do they deny the claim that their actions are in violation of the Deed Restrictions. This Court already held the Deed Restrictions give Plaintiff benefits held in gross, and Plaintiff has "a justiciable interest to enforce the deed restrictions regardless of its ownership of the land." (Dkt. No. 42 at 4.) The Court GRANTS Plaintiff's motion for a declaratory judgment that the Deed Restrictions are valid and enforceable.

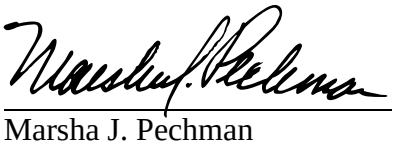
Conclusion

There is no issue of fact with regard to damages and summary judgment for breach of the am/pm agreements and Gasoline Dealer Agreements is GRANTED on Plaintiff's Second Cause of Action for breach of contract. The Guarantees were made for proper consideration, and summary judgment is GRANTED on Plaintiff's Third Cause of Action for breach of the

Guaranties. The Deed Restrictions are enforceable, and summary judgment is GRANTED on Plaintiff's First Cause of Action, Declaratory Judgment on the validity of the Deed Restrictions.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 6th day of August, 2013.



Marsha J. Pechman
Chief United States District Judge